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No. 87 - ___

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IN THE
SUPREME COURT OF THE UNITED STATES

87-7199

October Term, 1987

Jesse Lee,

Petitioner,

v.

State of Georgia,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF GEORGIA

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QUESTIONS PRESENTED

The State charged petitioner and the co-defendant with malice murder, felony murder and armed robbery. The prosecution alleged that petitioner and his brother, Roy Lee, also convicted, but sentenced to life imprisonment, robbed Mr. Spec Prather and that one of them, most likely petitioner, fired the fatal shot. (App. 4a-7a.)

I. Whether The Fourteenth Amendment Right to Due Process Necessitates a Change of Venue Due to Pre-trial Publicity, the Deceased's Standing in the Community and the Court's Grant of the Co-defendant's Motion.

II. Whether Excluding the Cognizable Segment of the Population of Individuals From Ages 18 Through 29 From the Grand and Trial Juries Violated Petitioner's Sixth Amendment Right to a Jury Selected From a Fair Cross-Section of the Community.

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

No. 87-____

JESSE LEE,
Petitioner,

v.

STATE OF GEORGIA,
Respondent.

OPINION BELOW

The opinion of the Georgia Supreme Court affirming petitioner's conviction and sentence of death and its addendum denying reconsideration (App. 1a-7a) are reported at 365 S.E.2d 99 (Ga. 1988).

JURISDICTION

The judgment of the Georgia Supreme Court was entered on February 25, 1988. (App. 1a.) A timely petition for rehearing was denied by order dated March 16, 1988. (App. 8a.) The time in which to petition for a writ of certiorari was extended to and including June 14, 1988, by order of Justice Kennedy dated May 9, 1988. (App. 9a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Sixth Amendment to the Constitution of the United States provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law ... "

2. The Eighth Amendment to the Consitution of the United States provides:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

3. The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

4. Section 15-12-40 of the Georgia Code provides in pertinent part:

> "(a) (1) [T]he board of jury commissioners shall compile, maintain, and revise a jury list of intelligent and upright citizens of the county to serve as trial jurors. In composing such list, the commissioners shall select a fairly representative cross section of the intelligent and upright citizens of the county from the official registered voters list of the county as most recently revised ... . If at any time it appears to the jury commissioners that the trial jury list, so composed, is not a fairly representative cross section of the county, they shall supplement the list by using other sources so as to assure the jury list is a fairly representative cross section of the intelligent and upright citizens of the county.
>
> (2) [T]he board of jury commissioners shall compile, maintain, and revise a grand jury list of intelligent and upright citizens of the county to serve as grand jurors. In composing such list, the commissioners shall select a fairly representative cross section of the intelligent and upright citizens of the county from the official registered voters list of the county as most recently revised ... . If at any time it appears to the jury commissioners that the grand jury list, so composed, is not a fairly representative cross section of the county, they shall supplement the list by using other sources so as to assure the jury list is a fairly representative cross section of the intelligent and upright citizens of the county. Such list shall not exceed two-fifths of the number of citizens on the county's most recent trial jury list.
>
> (3) ... Nothing in this article shall be construed to to prohibit a citizen who is otherwise qualified from being included in both the trial and grand jury lists of the county.

STATEMENT

The State of Georgia charged petitioner with malice murder, felony murder and robbery arising from the murder of Spec Prather. After Mr. Prather failed to return to work at his wrecker service, a search discovered him in his wrecker slumped over, shot in the head. (App. 3a.) The prosecution offered no direct evidence that petitioner fired the fatal shot and petitioner never admitted committing the killing. The prosecution offered as proof of guilt circumstantial evidence and inconsistencies in petitioner's statements to the police. (App. 3a-4a.)

In separate trials, petitioner and his brother, Roy Lee, the co-defendant, were found guilty. The co-defendant was sentenced to life imprisonment and petitioner to death. On petitioner's appeal, the Georgia Supreme Court affirmed the jury's conviction and sentence of death. (App. 7a.)

Motion for Change of Venue

Petitioner joined in his co-defendant's motion for a change of venue. It was the understanding of the co-defendants that if one motion was granted, the other would be as well. (App. 9a-10a.) However, petitioner's motion was denied and his co-defendant's was granted on the grounds that the publicity surrounding petitioner's trial made it impossible for the co-defendant to receive a fair trial in Walton County. (App. 6a.) The co-defendant received a life sentence rather than the death penalty. (App. 6a.)

Defense counsel tried to establish that the Prather murder attracted extraordinary interest in the community. However, the trial court prevented a full exploration of this issue. (App. 16a-17a.) Petitioner presented evidence that the local radio stations and newspapers ran the story of Mr. Prather's murder and the investigation. (App. 10a-17a.) According to radio station witnesses, people called in to inquire about the killing. Despite the defense's demonstration of proof and over its objection, the judge refused to admit comparisons of the number of persons who contacted the radio stations about this story as contrasted with other cases. (App. 16a-17a.)

As evidence of Mr. Prather's reputation in the community, the defense established that more than fourteen hundred people attended Mr. Prather's funeral. (App. 19a-21a.) According to the funeral director, this was a very large funeral. (App. 20a.) Over three hundred people in Walton County sent the Prather family condolence cards. (App. 26a.) Mr. Prather, who was 61 years old, was a leader in Walton County civic organizations with memberships of several hundred people. (App. 22a-26a.) Moreover, Mr. Prather was related to all four magistrates in Walton County. (App. 27a-28a.)

The trial court delayed judgment on the motion until after voir dire. (App. 29a.) During voir dire, potential jurors repeatedly admitted connections with Mr. Prather and his family, witnesses and counsel. (App. 30a-36a, a representative sample.) However, none of these people were acquainted with petitioner or his friends and family. Out of a jury pool of 50 people, over half had lived in Walton County all of their lives and all but five had lived there at least ten years. (App. 37a-39a, a representative sample.)

At the close of voir dire, the trial court denied petitioner's motion. (App. 6a.) Nonetheless, following petitioner's trial, the court granted co-defendant's motion to have his case heard in another county. Evidently, petitioner's trial had produced a barrage of news reports. (App. 6a.)

Challenge to Array of Grand and Treverse Juries

Petitioner challenged the grand and treverse juries on the ground that the significant underrepresentation of persons ages 18 through 29 in the jury pool violated the Sixth Amendment. He argued that the jury pool failed to represent a fair cross-section of the community. (App. 4a.)

Comprising 33.02 percent of the community, the group of persons ages 18 through 29 represented only 5.02 percent of the grand jury pool. (App. 40a-42a.) In terms of statistical differences between the group's presence in the community and in the jury pool, the comparitive disparity was 84 percent and

the absolute disparity 28 percent. (App. 42a-43a.) According to unrefuted testimony, 84 percent of the group was underrepresented in the grand jury pool. (App. 43a.)

For the traverse jury pool, the absolute disparity was 22 percent and comparitive disparity was 57 percent. (App. 44a.) Uncontested evidence established that the possibility of such extreme underrepresentation randomly occuring would be a bit less than one in a trillion. (App. 44a-45a.) According to the jury commissioners, the voter registration list served as the source of the jury pool. (App. 45a.)[1]

The Walton County Superior Court Clerk did not contest the statistical evidence, rather he testified that the jury commissioners used the voter registration list as the source of jurors and that they do not discriminate on the basis of age. (App. 46a-47a.) Despite the underrepresentation of the youngest third of the population, the jury commissioners did not try to rectify this gross disparity by going outside of the voter registration list. (App. 47a.)

The Clerk could not explain the disparity. (App. 48a.) He stated that commissioners chose the most intelligent and upright persons, "sort of the cream of the pick." (App. 49a.) The Chairman of the Board of Jury Commissioners claimed that no design operated to deny young persons representation on the basis of age and agreed with the Clerk's testimony. (App. 50a-51a.) The commissioners themselves were all over sixty years old. (App. 51a-52a.)

Notwithstanding the evidence that five percent of the jury pool represented one third of the population and that there was a one in a trillion chance of this randomly occurring, the trial judge found that the jury commissioners complied with the Georgia Code s 15-12-40, by placing on the jury roll "intelligent, upright and experienced persons." (App. 53a.) The judge ruled that no conclusions could be drawn from the extreme disparity in

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1. The judge barred the admission of evidence of underrepresentation for the period from April 1984 through 1986. (App. 33a-34a.)

the number of persons ages 18 through 29 and that this age group did not constitute a cognizable group. (App. 4a, 53a-54a.) The Georgia Supreme Court affirmed. (App. 4a.)

REASONS FOR GRANTING THE WRIT

1. The Fourteenth Amendment Right to Due Process Necessitates a Change of Venue Due to Pre-trial Publicity, the Deceased's Standing in the Community and the Court's Grant of the Co-defendant's Motion.

The Georgia Supreme Court violated petitioner's right to a fair trial by affirming the denial of his motion for a change of venue. Considering that the death penalty was at stake in a case of a well-publicized heinous crime in a small community, conducting the trial in Walton County precluded an impartial adjudication.

Indeed, denial of petitioner's motion when his co-defendant's motion was granted - in light of the fact the co-defendant received a life sentence - transgressed both the bounds of fairness which due process compels and the Eighth Amendment's prohibition against cruel and unusual punishment. Nonetheless, citing the fact that petitioner's co-defendant's trial followed petitioner's, the Georgia Supreme Court, seemed comfortable with the anomalous result of one life sentence and one death sentence for the same crime.

To establish standards for change of venue in death sentencing cases, this Court should grant petitioner's writ for certiorari. As Justice Brennan discussed in Brecheen v. Oklahoma, ___ U.S. ___, 108 S.Ct. 1085 (1988) (Brennan, J. dissenting from denial of certiorari), the states have developed differing standards. In a decision which can mean life or death for an accused, the need is pressing for a uniform standard which takes into account the high stakes unique to the sentencing phase of a capital case.

A. In a Small Community, the Jury's Familiarity with the Deceased, Witnesses, and the Crime Necessitated a Change of Venue in Light of the Jury's Sentencing Role of Choosing Life Versus Death.

Extensive publicity of a crime necessitates a change of venue to ensure a trial conducted in a neutral setting by an impartial jury. Groppi v. Wisconsin, 400 U.S. 505 (1971); Rideau v. Louisiana, 373 U.S. 723 (1963). In a small community where potential jurors have been exposed to publicity, and have been acquainted with the deceased and witnesses, the jury will almost always sentence the defendant to death rather than life in prison. See, Patton v. Yount, 467 U.S. 1025, 1044-1045, (1984) (Stevens, J. dissenting) (calling for a change of venue where all but two jurors had been exposed to pre-trial publicity).

Motions for change of venue in death penalty cases deserve heightened scrutiny. "Influences that might impair the truth-seeking function of the jury in its guilt determinations are not identical to those that impinge on its responsibility to administer fairly the death penalty." Brecheen v. Oklahoma, 108 S.Ct. 1085, at 1087. In the sentencing phase the jury does not determine facts, an exercise individuals are accustomed to performing in their daily lives, rather "[i]t must make [an unparalled] moral decision of whether a defendant already found guilty deserves to die for his crime." Id.

Since the jury in a bifurcated trial determines the moral question of the sentence, the fact that jurors knew the deceased, the deceased's family, and the prosecution's witnesses, presumptively establishes the fundamental unfairness of the sentencing proceeding. Brecheen, 108 S. Ct. at 1087-1088. The jury's role at sentencing to speak for the "conscience of the community on the ultimate question of life or death" cannot be performed impartially when the jury has preexisting personal knowledge of the persons and events. Id. at 1087; Witherspoon v. Illinois, 391 U.S. 510, 519 (1968).

In a capital case where the defendant seeks a change of venue, permitting jurors with such familiarity to decide whether to impose the death sentence would distract the sentencing jury's attention to the victim's standing in the

community rather than appropriate considerations of the accused's record and the circumstances of the crime. Booth v. Maryland, 482 U.S. ___, 107 S.Ct. 2529, 2534 (1987). For these reasons, in Booth, this Court forbade the introduction of the victim impact statement during the sentencing phase of a capital trial as a violation of the Eighth Amendment.

> Nor is there any justification [where venue is challenged] for permitting such a decision to turn on the perception that the victim was a sterling member of the community rather than someone of questionable character [citations omitted]. This type of information does not provide a 'principled way to distinguish cases in which the death penalty was imposed, from the many in which it was not.' [Citations omitted.] Id.

As Justice Powell pointed out in Booth, the defense can not rebut "proof" of the victim's character in the jurors' minds without conducting a "mini-trial," an idea deemed abhorrent to the constitutional role of the jury to determine "whether the death penalty is appropriate in light of the background and record of the accused and the particular circumstances of the crime." Id. at 2535.

In the case at bar, the jurors were familiar with the deceased's reputation as a leader in Walton County and were exposed to publicity of a gruesome crime in their small community as the investigation developed. They sat in judgment with the same knowledge embodied in a victim impact statement. Brecheen, 108 S.Ct. 1085. Seeing the petitioner on trial - a man who has never contributed to his locality - and listening to testimony about the killing of a venerable, pillar of the community, the Walton County jury could only be expected to seek vengence.

No other choice existed for a jury sitting in judgment of a poor young black man on trial for killing an influential older white man with a sterling reputation. These impermissible, yet unavoidable, influences became factors in the moral exercise of sentencing. Change of venue must be granted to eliminate these excess prejudicial influences and to determine fairly the appropriate penalty for petitioner's crime. This case provides the perfect vehicle in which the Court can address the implications of bifurcated death penalty adjudication on motions requesting nuetral and distant forums.

B. The Georgia Supreme Court Violated the Eighth Amendment By Approving the Co-Defendant's Motion for Change of Venue and Affirming the Denial of Petitioner's Motion Where the Prosecution's Cases Against the Accuseds Were Based Upon Practically Identical Evidence.

The lighter sentence of life in prison which the co-defendant received in another county (following petitioner's trial) demonstrates that the Georgia Supreme Court denied petitioner a fair adjudication in a neutral setting. Imposition of a death sentence against an accused whose co-defendant received a life sentence based on the same or similar proof is patently unfair and demonstrates an arbitrary death penalty sentencing process at work. See, Gregg v. Georgia, 428 v. 153 (1976); Furman v. Georgia, 408 U.S. 238 (1972).

The prosecution possessed practically identical evidence against petitioner and his co-defendant. None of the evidence showed which defendant shot Mr. Prather. None of the witnesses stated who pulled the trigger. The same witness placed petitioner and co-defendant near the scene. Petitioner's statements to the police, a major source of the prosecution's case, make it more likely that the co-defendant shot the deceased. On this issue, petitioner's statements were uncontradicted.

That a small speck of blood of unknown type and origin was found on petitioner's shoe and one witness (whom petitioner had implicated in the crime) testified that petitioner came home with blood on his shirt, did not by any means establish that petitioner was the triggerman. Likewise, it is not dispositive that the co-defendant was found with the gun hidden in his home.

The prosecution offered no evidence to establish that petitioner pulled the trigger and the co-defendant's culpability was in doubt. A jury outside of Walton County imposed a life sentence on the co-defendant when offered practically identical evidence to that used against petitioner. The Georgia Supreme Court's erroneous decision may very well have meant the difference between life and death.[2] By denying the motion for change of venue, the

2. The injustice perpetrated against petitioner is exacerbated by the fact that the parties assumed upon making a joint motion for change of venue that both motions would be granted or denied.

Georgia court denied petitioner the neutral trial setting afforded the co-defendant and violated petitioner's Eighth Amendment rights. This Court must accept petitioner's case to send a clear message to state courts that co-defendants in captial cases must receive equal treatment.

II. Systematically Excluding the Cognizable Group of Individuals From Ages 18 Through 29 From the Jury Pools Violated Petitioner's Sixth Amendment Right to a Jury Selected From a Fair Cross-Section of the Community.

The Sixth Amendment mandates states "to prescribe relevant qualifications for their jurors and to provide reasonable exemptions so long as it may be fairly said that the jury lists ... are representative of the community." Taylor v. Louisiana, 419 U.S. 522, 538 (1975). A disproportionate and systematic exclusion from the jury lists of a distinctive group comprising one third of the community runs afoul of the fair cross-section requirement. Duren v. Missouri, 439 U.S. 357, 370 (1979); Hernandez v. Texas, 347 U.S. 475, 477-478 (1954).

A. Persons Ages 18 Through 29 Constitute a "Cognizable Group" For Purposes of the Sixth Amendment Fair Cross Section Requirement.

This Court has recognized as "cognizable" diverse ethnic, gender and racial groups which have suffered discrimination in their communities. See, Duren, 439 U.S. 357, at 360-362; Hernandez v. Texas, 347 U.S. 475, at 479. In counties across the country, including Walton County, 70 to 80 millions people ages 18 through 29 comprise one third of the population. Distinguished by age, station in life and common perspective, this group deserves the recognition afforded other "cognizable" segments of the population.

Despite extreme underrepresentation, the lower courts are split over the cognizability of broad age groups. Some courts have condemned discrimination on the basis of age (or age related situtations) in compiling a jury list or selecting juries.[3] Other courts permit large segments of the population to

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3. Lower courts have recognized other cognizable groups, including a white majority, Romen v. Abrams, 822 F.2d 214 (2d Cir. 1987); Latin-Americans in

on unrepresented d ate the constitutionally mandate fair cross-section requirement.

In Guidance Unidos de San Juan v. Hidalgo County Grand Jury Commissioners 622 F.2d 807, 819 (5th Cir.), cert. denied, 450 U.S. 964 (1980), where plaintiffs charged the grand jury commissioners with excluding persons ages 18 through 28, the Fifth Circuit declared "an individual's youth and poverty bears no relation to his competency for grand jury service and an exclusionary classification based on these criteria is unreasonable" (holding that members of four assertedly cognizable groups had standing to challenge grand jury selection process). In Julien v. State, 215 S.E.2d 496, 498 (1975), the Georgia Supreme Court held that jury pools monopolized by elderly white men violated the fair cross-section requirement.[4]

Despite extreme underrepresentation, other courts reject the notion of "young adulthood" as the basis for cognizability. Willis v. Kemp, 838 F.2d 1510,1516-1517 (11th Cir. 1988); Barber v. Ponte, 772 F.2d 982, 1001 (1st Cir. 1985) (en banc), cert. denied, 475 U.S. 1050 (1986); Parks v. State, 254 Ga. 403, 330 S.E.2d 686 (1985). These courts contend that these eligible jurors lack the collective internal cohesiveness purportedly necessary for recognition as a cognizable group. In their view, cognizability requires a showing of "a common thread or similarity of attitudes binding all members [(citations omitted),] ... not shared by the remainder of the community."

Florida, United States v. Cabrera-Sarmiento, 533 F. Supp. 799, 804 (S.D. Fla. 1982); Italian Americans, United States v. Biaggi, 673 F. Supp. 98, 101 (E.D.N.Y. 1987); and students, Pecione v. Marshall, 45 A.D.2d 462, 359 N.Y.S.2 360, 362-363 (4th Dept.), aff'd, 35 N.Y.2d 289, 360 N.Y.S.2d 882, 319 N.E.2d 199 (1974). But see, United States v. Cecil, 836 F.2d 1431, 1445-1449, 1454 (4th Cir. 1988), petition for cert. filed (March 28, 1988) (denying challenge in federal trial to voter registration list as source for jury list on grounds that there was no systematic discrimination and unwillingness to examine the cognizability of diverse groups).

4. Other courts have sidestepped the issue or assumed that persons within broad age groups comprise a cognizable group. See, Hamling v. United States, 418 U.S. 87, 138 (1974) (upholding propriety of not filling jury wheel for years so long as no discrimination in updating jury list); People v. Attica Brothers, 79 Misc.2d 492, 359 N.Y.S.2d 699 (Erie Co. 1974) (assuming that persons ages 18 through 21 constituted a cognizable group; but finding no exclusion where jury list updated monthly).

Willis, at 1516. These courts see the fair cross-section requirement as mandating "attitudinal representativeness." Berber, at 999.

"Groups cognizable for jury selection are not limited to those groups possessing the immutable characteristics which trigger strict scrutiny under the fourteenth amendment." Berber, 772 F.2d at 985 (on original hearing, reversed on rehearing en banc) (citing Thiel v. Southern Pacific Co., 328 U.S. 217, 220 (1946)). A fair cross-section of the community should represent those from various strata of society, regardless of group attitudes, to preserve the democratic significance of the jury. In Thiel, this Court ruled that exclusion of poor people from the jury rolls was unconstitutional. Court did not look for attitudinal commonality among the group members. Thiel, 328 U.S. 217.

Indeed, women have been recognized as a cognizable group. Yet, women's attitudes and lifestyles span the social and political spectrum. As a group, they lack the common attitudes, habits and cultural background often associated with distinct segments of the population which have been accorded the status of a cognizable group. However, this Court has not hesitated to condemn the systematic exclusion of women from jury venires. Duren, at 362; Taylor v. Louisiana, 419 U.S. 522, at 534. Young adults from 18 through 29 often suffer the same injustices as women. They too are confronted with attitudes resistant to change and are discriminated against based on group membership. Ziegler, Young Adults As a Cognizable Group, 76 U. Mich. L. Rev. 1045, 1074 (1978).

Age operates much like social class to stratify the population. Generally, society divides into three main adult phases - young adult, middle aged and aged. Age figures prominently in one's opinions about central aspects of life such as health, personal problems, or death. Ziegler, supra, at 1074. Indeed, because age significantly effects major decisions and most persons accused of crimes are under 30, "the nearly universal underrepresentation of the youngest ages group on jury rolls poses a danger of age bias in most criminal cases." Id. at 1080.

In Walton County, the jury commissioners included only five percent of 18 to 29 year olds in the grand jury pool and eleven percent in the trial jury pool. This identifiable group comprises a significant segment of the population. Its numbers and proportion are of sufficient magnitude to constitute a cognizable group. This Court must address the importance of this bloc of eligible, yet discriminated against, potential jurors. A clear standard is needed to correct the errors of many lower courts, to establish that jury commissioners may not discriminate against persons between 18 and 29 on the basis of age. See, White v. Georgia, 414 U.S. 885, 887-890 (1973) (Brennan, J. dissenting from dismissal for lack of jurisdiction).

B. Where There Was Only a One In a Trillion Chance of Such Extreme Underrepresentation Randomly Occurring and the Jury Commissioners Failed to Supplement the Jury Lists, the Georgia Judiciary Deprived Petitioner of His Right to a Jury Chosen From a Fair Cross-Section of the Community.

At the time of petitioner's jury selection, the grand jury list excluded 84 percent of persons ages 18 through 29 and the trial jury list excluded 66 percent of this group. The chance of such underrepresentation randomly occurring is one in a trillion. (App. 53a.)

Petitioner bears the burden of showing that the underrepresentation of the cognizable group was not only unreasonable but also resulted from systematic exclusion. Duren v. Missouri, 439 U.S. 357, at 364. Such outrageous underrepresentation in the Walton County jury pool was unfair and unreasonable. The vast majority of persons between 18 and 29 were effectively barred from serving on grand and trial juries.

Since the Georgia Supreme Court failed to find cognizability, it never reached the reasonableness of the disputed underrepresentation or the question of official exclusion. Georgia Code s 15-12-40 obligates the commissioners to supplement the list when it does not reflect a "fairly representative cross-section of the intelligent and upright citizens of the county." In the case at bar, the jury commissioners admitted that they neglected to take supplemental action. Their omission constituted systematic exclusion of

constitutional magnitude. Where one third of the population was so obviously underrepresented in the pool of potential jurors, the Sixth Amendment obligated the commissioners to add members of the excluded group to the list.

In Taylor v. Louisiana, 419 U.S. 522, at 534, the Court compelled the States to offer "more than merely rational grounds" to justify trumping the "assurance of diffused impartiality" guaranteed by a representative jury pool. Id. Once petitioner proved an unreasonable and systematic exclusion, the burden shifted to the State to demonstrate a significant interest which precluded attainment of a fair cross-section of the community in the jury pool. Duren v. Missouri, 439 U.S. 357, at 364, 367.

The State of Georgia did not counteract petitioner's prima facie case. It failed to assert any significant state interest which was incompatible with attainment of a venire from a fair cross-section of the community. Duren, 439 U.S. at 368. The jury commissioners also never attempted to supplement the lists and failed to assert any significant state interest which precluded corrective action. The Georgia Supreme Court infringed petitioner's Sixth Amendment right by approving, indeed fostering, the systematic exclusion of persons ages 18 through 29 from the venire.

Singling out this class for different treatment based upon the unreasonable classification of age thwarts the protection and values of the guarantee to a jury chosen from a fair cross-section of the community. U.S. Const., Amend. XIV; Hernandez v. Texas, 347 U.S. at 475, 478. In a death penalty case this constitutional infringement takes on added importance. Not only does the jury weigh facts to determine guilt or innocence, the jury also makes the moral decision between life and death.

All of the jury commissioners were over 60 years old. The deceased was a man of their ranks - older, well known and established in Walton County. In contrast, petitioner was a young man who grew up in a different environment. Mr. Prather was a respected and cherished leader of the community, as the turnout at his funeral demonstrated. Petitioner, on the other hand, had not yet accomplished anything in life and was clearly "in trouble."

The jury commissioners' conception of "intelligent and upright citizens" obviously did not include people who were no less moral, humane and intelligent than themselves but were merely younger. The members of the cognizable group were discriminated against purely on account of age.

Those for whom adulthood is new may well have a greater understanding of youthful mistakes, be less inclined to terminate a young life, or be less prejudiced in a case of a young black man on trial for killing an established white member of the community. Moreover, in petitioner's case, younger persons in Walton County would have been less likely to have known Mr. Prather or have been awed by his importance in the community. Had the jury list included a proportionate number of persons in petitioner's age range, petitioner might not be today awaiting a sentence of death.

Despite such speculation, whatever the outcome of the sentencing trial otherwise might have been, the systematic exclusion of persons ages 18 through 29 denied petitioner his right to select a jury from a pool which reflected the makeup of the population.

Age must not be used as a proxy for less respectable attitudes and prejudices. The Supreme Court of the United States must stamp out discrimination on the basis of age - young or old. The lower courts need a strong message that this Court will not tolerate jury pools where the vast majority of a cognizable group is excluded, especially a group likely to harbor antiestablishment sentiments and goals. This Court must grant certiorari to protect those accused of crimes from jury pools lacking large segments of the population - whether traditional cognizable groups or not - and to maintain the democratic tradition of the jury process.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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1601 18th Street, N.W.
Washington, D.C. 20009
(202) 387-5053

COUNSEL FOR PETITIONER

APPENDIX

of potential jurors on voir dire. [Cits.]" *Page v. State*, 249 Ga. 648(4), 292 S.E.2d 850, supra. The error, if any, was harmless. See *Robinson v. State*, 238 Ga. 291(2), 232 S.E.2d 561 (1977).

[3] 3. The appellant objected at the trial to the introduction in evidence of pre-autopsy photographs of the victim's body taken at the crime scene after the body had been lying in a muddy ditch for approximately 48 hours, and pre-incision photographs taken during the autopsy.

"'A photograph which shows mutilation of a victim resulting from the crime against him may, however gruesome, have relevance to the trial of his alleged assailant.' *Brown v. State*, 250 Ga. 862, 867 (302 SE2d 347) (1983)." *Wilson v. State*, 257 Ga. 444, 447(8), 359 S.E.2d 891 (1987). The photographs, "though gruesome, were relevant and material to show the location of the wounds, *Lamb v. State*, 241 Ga. 10(2) (243 SE2d 59) (1978), and to depict the crime scene, including the location of the victim. *Stewart v. State*, 254 Ga. 233(3) (326 SE2d 763) (1985)." *Sanders v. State*, 257 Ga. 239, 357 S.E.2d 66 (1987). Unlike the facts in *Brown*, supra, the body here had not been in the custody of the state long enough to afford an opportunity to make photographs of the crime scene earlier, and the autopsy photographs were taken prior to, rather than after, incision.

Enumerated error 3 is without merit.

[4] 4. In enumerated errors 4, 5, and 6, Brooks states that the theory of his defense was that he had withdrawn from a fight with the victim, only to discover that he was going in the wrong direction, and that, when he returned, the victim assaulted him with a knife and Brooks defended himself. He contends that the homicide constituted either justifiable homicide (self-defense) or, at worst, voluntary manslaughter, and that the trial court's refusal to give several of his requests to charge, which were necessary to present his defense, was error.

The court need not have charged in accordance with the appellant's requests, because the instructions as given presented every aspect of his defense, including the legal effect of withdrawal from the scene. The court charged on voluntary manslaughter, whether or not he was entitled to such a charge on the facts of his case. These enumerated errors are without merit, as the court's charge covered substantially the same principles as the requested charges. *Felker v. State*, 252 Ga. 351, 368(3) 314 S.E.2d 621 (1984).

[5] 5. Enumerated error 7 contends that Brooks was the only witness to the homicide; that neither the direct nor the circumstantial evidence contradicted his version of the events (i.e., self-defense); and that, accordingly, the verdict should have been voluntary manslaughter at worst. However, applying the standard of *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), we conclude that the jury's verdict of guilty of murder was supported by the evidence, including the circumstances that, prior to the fatal stabbing, the appellant had argued with and shot the victim.

Judgment affirmed.

All the Justices concur.

LEE

v.

The STATE.

No. 44930.

Supreme Court of Georgia.

Feb. 25, 1988.

Defendant was convicted in the Superior Court, Walton County, Greeley Ellis, J., of malice murder and armed robbery and sentenced to death, and he appealed. The Supreme Court, Smith, J., held that: (1) defendant was not entitled to have sup-

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Clerk's Office, Supreme Court of Georgia

DEAR SIR: ATLANTA March 16, 1988

The motion for a rehearing was denied today:

Case No. 44930, Lee v. The State

Yours very truly,

MRS. JOLINE B. WILLIAMS, Clerk

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tained his challenge to array of grand and traverse juries on ground that persons aged 18 through 29 were significantly underrepresented on jury lists in county; (2) defendant's criminal record and letter written by defendant from jail while awaiting trial were properly admitted in evidence at sentencing phase of death penalty case; and (3) death sentence imposed was neither excessive nor disproportionate to sentence given defendant's brother, life sentence, or to sentences imposed in similar cases generally.

Affirmed.

1. Homicide ⇐250

Evidence supported conviction for malice murder, although defendant did not admit to killing victim himself in any of his contradictory statements to law enforcement officers and argued that his admission that he knew there was going to be a killing was just a conclusion based on his knowledge of his brother's personality.

2. Grand Jury ⇐17
Jury ⇐33(1.4)

Defendant was not entitled to relief on his challenge of array of grand and traverse juries on ground that persons aged 18 through 29 were significantly underrepresented on jury lists in particular county, where defendant presented no evidence from which trial court could have found as fact that young persons were cognizable group in the county.

3. Criminal Law ⇐594(1)

Defendant had failed to demonstrate any harm from denial of continuance until enzyme results of tests of blood on shorts were obtained; blood type on shorts was that of witness who claimed blood on shorts was hers, from where she had cut hand, and was that of victim, and enzyme comparison showed that blood on shorts was consistent in all identifiable respects with that of witness, as well as of victim, so that results of blood tests were equally consistent with theories of State and defense.

4. Criminal Law ⇐867

Defendant was not entitled to mistrial based on witness' testimony that he asked defendant when was the last time defendant had been in trouble, after witness had been instructed that he was not to mention fact that witness knew defendant in prison; the answer was not so prejudicial as to require mistrial.

5. Criminal Law ⇐720(1)

State was entitled to refer in closing argument to defendant's purchases of a number of items with proceeds of crime although the items themselves were not admitted in evidence, where there was testimony to the purchases. O.C.G.A. § 17-8-75.

6. Criminal Law ⇐986.6(1)

Although defendant's character is not an issue at guilt phase of trial, unless and until defendant elects to make it so, defendant's character is an issue in death penalty sentencing phase.

7. Criminal Law ⇐986.6(3)

Defendant's criminal record was properly admitted in evidence in death penalty sentencing phase of trial.

8. Criminal Law ⇐986.6(3)

Letter written by defendant from jail while awaiting trial was admissible in death penalty sentencing phase of trial; the letter stated that defendant was coming back, when he came back he was going to be crazy, he wanted to kill someone badly, and he wanted letter recipient and third person to take care of his children for him.

9. Criminal Law ⇐1173.2(4)

Failure to give sentencing phase charge approved in judicial decision was not reversible error absent request, although it was better practice to give such a charge when more than one defendant was involved in crime.

10. Criminal Law ⇐126(1)

To prevail on motion for change of venue, defendant must show such extensive and prejudicial pretrial publicity that county in which crime occurred presumptively is incapable of providing fair trial to

defendant or must establish from jury selection process itself—voir dire examination and qualification of prospective jurors—that change of venue is necessary.

11. Criminal Law ⇐126(1)

Defendant was not entitled to change of venue, where defendant conceded at trial that he was satisfied with jury selection process and defendant had not shown that pretrial publicity was so extensive and prejudicial as to require change of venue.

12. Criminal Law ⇐983
Homicide ⇐354

Death sentence imposed on defendant convicted of malice murder and armed robbery was not excessive nor disproportionate to life sentence given defendant's brother, or to sentences imposed in similar cases generally, although defendant characterized brother as both mastermind and triggerman and characterized himself as mere abettor; evidence showed defendant was active and willing participant in crime which he knew would end in murder, and defendant had prior record including convictions for six theft offenses and two first-degree forgeries.

13. Homicide ⇐351

Evidence regarding imposition of death penalty supported finding that murder was committed while defendant was engaged in armed robbery and that murder was committed for purpose of receiving money; defendant had blood on his clothes and admitted to friend on afternoon of murder that he had obtained a lot of money by shooting somebody. O.C.G.A. §§ 17-10-30(b)(2, 4), 17-10-35(c)(2).

Michael R. Jones, Loganville, Charles E. Day, Monroe, for Jessie Lee.

John M. Ott, Dist. Atty., Monroe, Michael J. Bowers, Atty. Gen., for the State.

SMITH, Justice.

Appellant, Jesse Lee, was convicted of malice murder and armed robbery by a Walton County jury and sentenced to death. We affirm.[1]

Late in the morning of August 5, 1986, Spec Prather, who operated a wrecker service for H & W Motors in Monroe, Georgia, received a telephone call concerning a disabled automobile at the Rolling Hills trailer park.

At noon that day, the wrecker stopped on Davis Street in Monroe, picked up the defendant and his brother Roy, and left in the direction of the trailer park.

Later that afternoon, the defendant showed some friends a large amount of money, which he claimed to have won. However, Doug Robinson testified that "I talked to [the defendant] and took him aside and we talked and I asked him where did he get the money ... and he finally came out and told me he shot somebody."

When Spec Prather failed to return that afternoon, a search was conducted, and his wrecker was found on a dirt road not far from the Rolling Hills trailer park. Prather lay slumped over inside the wrecker, shot in the head with a .22 caliber pistol.

The defendant was questioned by law enforcement officers the next day (August 6), and he told them where to find the victim's wallet. He denied being present when the victim was shot, claiming that his brothers Roy and Jimmy handled that part of it while he waited a short distance up the road in a blue-grey Ford automobile that Roy had borrowed. The defendant stated that Roy gave him $305 to hold overnight but that he was to return it to Roy the next day.

Later that day, the defendant gave a second statement. This time, he claimed he was driving a blue Chevrolet that his girlfriend Sue Nett Williams borrowed from her daughter and son-in-law. Sue Nett and the defendant drove past the

1. The crime was committed August 5, 1986. This case was tried May 11 through May 13, 1987. The jury returned its verdict as to sentence on May 13, 1987, and the court imposed sentence on May 27, 1987. The defendant filed his motion for new trial on June 8, 1987, and an amendment thereto on July 8, 1987. The motion was denied on the latter date and the case was docketed in this court August 7, 1987. The case was orally argued on October 14, 1987.

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wrecker, turned around, and stopped to pick up Roy and Jimmy. He and Sue Nett got out and looked inside the wrecker. The defendant stated: "She [looked] in there [and] she freaked out. Like at the time I didn't know he was shot." The defendant got $330, and gave $30 to Sue Nett for borrowing the car.

On August 7, the defendant called the Monroe Chief of Police and requested an interview. He then gave a third account of the crime, in which he and Sue Nett borrowed a green 1962 Chevrolet without the owner's knowledge. They drove up to the wrecker, and the defendant saw Roy pointing a gun at the driver. He let Sue Nett out. As he was turning around, he heard the shot, and then he saw Sue Nett push the driver over and take his wallet. In this statement the defendant admitted knowing ahead of time that the driver was going to be killed.

[1] 1. The defendant argues that the evidence does not support his conviction for malice murder. He notes that in none of his statements to law enforcement officers did he admit killing the wrecker driver himself, and his admission that he knew there was going to be a killing "is clearly just a conclusion of the defendant based on his knowledge of his brother's personality." Brief of appellant, p. 10.

The defendant, however, did not merely draw an after-the-fact conclusion of the inevitability of the killing. Rather, he admitted to law officers that the killing "was in the plan," that everyone involved knew what the plan was, and that it was a necessary step in the commission of the crime to eliminate the only possible witness against them.

Moreover, the jury was not required to accept as true everything the defendant said—in fact, the jury *could not* have, given the inconsistencies in his statements, but aside from that, the state offered credible evidence establishing that (1) contrary to the defendant's statements, Jimmy Lee and Sue Nett Williams were elsewhere when the crime was committed and could not have participated in the crime, (2) the defendant and his brother Roy rode in the wrecker to the scene of the crime and *walked* back to town, (3) on his return home, the defendant had blood on his shirt and shoes, took a bath and made Sue Nett wash his shirt, and (4) notwithstanding his denials to law enforcement officers, the defendant admitted to Doug Robinson that he had shot somebody in order to obtain money.

The evidence supports the defendant's conviction for malice murder. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

[2] 2. The defendant challenged the array of the grand and traverse juries on the ground that persons aged 18 through 29 are significantly underrepresented on the jury lists in Walton County. His challenge was overruled. Inasmuch as the defendant presented no evidence from which the trial court could have found as a fact that young persons are a cognizable group in Walton County, the trial court did not err by overruling the challenge. *Hicks v. State*, 256 Ga. 715(7), 352 S.E.2d 762 (1987).

[3] 3. The day after the crime, law enforcement officers searched the residence shared by the defendant and Sue Nett Williams. They discovered and seized a pair of blood-stained shorts. The blood was examined as to type and two identifiable enzymes and found to be consistent with that of the victim. The defense contended that the shorts belonged to Sue Nett and not to the defendant. A few days before the trial, the prosecutor asked Sue Nett if they were hers. She said they were, and that the blood on them was hers, from where she had cut her hand on a screen door several days prior to the crime. A sample of her blood was drawn and examined. She was found to have the same blood type (O) as the victim, but the trial began before the enzyme comparison was completed.

The defendant moved for a continuance, on the ground that the enzyme comparison would be highly relevant to his contention that Sue Nett was involved in the crime. The district attorney responded that the enzyme results "should be back tomorrow

morning," and he was confident that she was *not* involved in the crime, and that the results would be consistent with the blood being hers.

The defendant's attorney then stated to the court: "We ask you to reserve your decision on the motion for continuance and I don't think we will get into it in the morning, just see how it develops, but I felt compelled to bring it up today."

The trial court denied a continuance, stating, "Of course, if there is not a sufficient break during the trial itself for you to examine the scientific evidence when it does come in tomorrow, I will consider any motion at that time for a recess for that purpose."

As the district attorney predicted, the enzyme comparison showed that the blood on the shorts was consistent in all identifiable respects with that of Sue Nett, as well as that of the victim. However, although the defendant made no further motion in this regard at trial, he contends on appeal that the court reversibly erred by denying his motion for continuance.

Contrary to the defendant's contention, the results of the enzyme comparison did not "radically alter" either the state's theory or that of the defense; the results were equally consistent with both. The defendant has failed to demonstrate any harm from the denial of the continuance. We find no abuse of discretion in the trial court's ruling. *Ealy v. State*, 251 Ga. 426(3), 306 S.E.2d 275 (1983).

4. The trial court did not abuse its discretion at the voir dire examination by requiring the defendant to rephrase his question relating to the credibility of police officers. See, e.g., *Boyer v. State*, 178 Ga. App. 372(3), 343 S.E.2d 146 (1986).

[4] 5. Edward "Teenie" Towler testified for the state at the guilt phase of the trial. Towler saw the defendant and Roy Lee standing by his mailbox on Davis Street on the morning of August 5, 1986. He knew the defendant, having been imprisoned with him, and talked to him briefly. The defendant told him he was waiting for a wrecker. As they were talking, the wrecker drove up, and the defendant and his brother got in and rode off.

Before Towler testified about this incident, the district attorney asked for a bench conference and warned the court that the witness had known the defendant in prison. The court sent the jury to the jury room and instructed the witness that he was "not to mention the fact that you knew [the defendant] in prison...." The examination resumed, and the state asked Towler what the defendant was waiting for. Towler answered: "Well, you know, I came out my door to the mailbox and I seen them standing out there. I didn't have to talk to them, I asked Jesse, I say when is the last time you been in trouble; he said well, I ain't been in no trouble, I said...."

The defendant objected and moved for a mistrial on the ground that impermissible character evidence had been elicited. The court denied the motion for mistrial. The answer was not so prejudicial as to require a mistrial. *Sabel v. State*, 250 Ga. 640(5), 300 S.E.2d 663 (1983).

[5] 6. There is no merit to the defendant's contention that the state argued facts not in evidence, in violation of OCGA § 17-8-75. There was testimony in evidence that the defendant had purchased a number of items with the proceeds of the crime, and the state was entitled to refer to these purchases in its closing argument notwithstanding that the items themselves were not admitted in evidence.

7. It is well settled that the state is not limited to proving *statutory* aggravating circumstances. See e.g., *Zant v. Stephens*, 250 Ga. 97, 100, 297 S.E.2d 1 (1982). Sentencing proceedings in death penalty cases are governed not only by OCGA § 17-10-30, but also by OCGA § 17-10-2, which authorizes the factfinder to hear *additional* evidence in aggravation, "including the record of any prior criminal convictions."

[6] Although a defendant's character is not an issue at the guilt phase of the trial, "unless and until the defendant elects to make it so ..." *Frazier v. State*, 257 Ga.

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690(16), 362 S.E.2d 351 (1987) (at 359), it is an issue at the sentencing phase. *Fugitt v. State*, 256 Ga. 292, 296, 348 S.E.2d 451 (1986); *Fair v. State*, 245 Ga. 868, 873, 268 S.E.2d 316 (1980). See also, *Ford v. State*, 257 Ga. 461(1), 360 S.E.2d 258 (1987).

[7, 8] The defendant's criminal record was properly admitted in evidence at the sentencing phase of the trial, as was a letter written by the defendant from jail while awaiting this trial, in which he stated to a friend: "I am coming back, man. When I get back I am going to be crazy, man, on somebody ... I like the way you and Linda take care of things, but I am going to kill this person ... I want to kill this person real, real bad ... I am going to do that, when I do that, I want you and Linda to take care [of my children] for me."

[9] 8. The defendant contends the trial court erred by failing to give a sentencing-phase charge approved in *Davis v. State*, 255 Ga. 598, 611(18), 340 S.E.2d 869 (1986), relating to the principles announced by the U.S. Supreme Court in *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d (1982). Although it is "the better practice" to give such a charge when more than one defendant is involved in the crime, see *Cargill v. State*, 255 Ga. 616, 643(32), 340 S.E.2d 891 (1986), the failure to give it is not reversible error in the absence of a request.

9. The defendant contends the trial court erred by denying his motion for change of venue. He notes that his brother was given a change of venue and received a life sentence and argues that the only "plausible explanation for the difference in sentence for the two co-defendants was that one was granted a change of venue and the other was not."

We address the question of proportionality in Division 10, infra. We do not agree that the change of venue is the only plausible reason for the disparate sentencing results.

[10] In order to prevail on a motion for change of venue, (1) the defendant must show such extensive and prejudicial pre-trial publicity that the county in which the crime occurred *presumptively* is incapable of providing a fair trial to the defendant, or (2) he must establish from the jury selection process itself—the voir dire examination and qualification of prospective jurors—that a change of venue is necessary. *Devier v. State*, 253 Ga. 604, 608–609, 323 S.E.2d 150 (1984).

[11] The defendant conceded at trial that he was satisfied with the jury selection process, and he has not shown that the pretrial publicity was so extensive and prejudicial as to require a change of venue. *Chancey v. State*, 256 Ga. 415, 430–31, 349 S.E.2d 717 (1986). The record supports the trial court's determination that this defendant could obtain a fair trial in Walton County. Although the question of the necessity for a change of venue in Roy's case is not before us, we note that the defendant was tried first and Roy afterwards, so that Roy's venire, unlike the defendant's, was exposed to publicity generated by a recent trial of the same crime.

[12] 10. The defendant argues that his death sentence is excessive and disproportionate because his brother, whom he characterizes as both the "mastermind" and the "triggerman," received a life sentence, while the defendant, who was a "mere abettor," got death. See *Hall v. State*, 241 Ga. 252(8), 244 S.E.2d 833 (1978).

The evidence, however, gives little support to the defendant's contention that he was a "mere abettor." It shows, rather, that he was an active and willing participant in a crime that he knew would end in murder. Moreover, contrary to the defendant's contention that "all the evidence" indicates that Roy killed the victim, in fact, only the defendant's statements to law enforcement officers so indicate, and these statements, for a variety of reasons, including their inconsistencies and their attempts to blame persons who could not have been involved, do not persuasively establish the identity of the killer. Other evidence, including testimony that the defendant had blood on his clothes and his admission to a friend on the afternoon of the murder that

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he had obtained a lot of money by shooting somebody, indicate that the defendant, and not his brother, was the actual killer.

In addition, the jury in this case considered not only the circumstances of the offense, but also the defendant's prior record, including convictions for six theft offenses and two first-degree forgeries. Compare *Horton v. State*, 249 Ga. 871(13), 295 S.E.2d 281 (1982).

Considering the crime and the defendant, the death sentence is neither excessive nor disproportionate to the sentence given to the defendant's brother, or to sentences imposed in similar cases generally. See *Beck v. State*, 255 Ga. 483(6), 340 S.E.2d 9 (1986).

11. The death sentence was not imposed as a consequence of passion, prejudice, or other arbitrary factor. OCGA § 17-10-35(c)(1).

[13] 12. The evidence supports the jury's finding that the murder was committed while the defendant was engaged in the commission of the offense of armed robbery, OCGA § 17-10-30(b)(2) and that the murder was committed for the purpose of receiving money, OCGA § 17-10-30(b)(4). OCGA § 17-10-35(c)(2).

13. The similar cases listed in the appendix support the imposition of a death sentence in this case. OCGA § 17-10-35(c)(3).

Judgment affirmed.

All the Justices concur.

APPENDIX.

Harrison v. State, 257 Ga. 528, 361 S.E. 2d 149 (1987); *Beck v. State*, 255 Ga. 483, 340 S.E.2d 9 (1986); *Ingram v. State*, 253 Ga. 622, 323 S.E.2d 801 (1984); *Spivey v. State*, 253 Ga. 187, 319 S.E.2d 420 (1984); *Roberts v. State*, 252 Ga. 227, 314 S.E.2d 83 (1984); *Mincey v. State*, 251 Ga. 255, 304 S.E.2d 882 (1983); *Jones v. State*, 249 Ga. 605, 293 S.E.2d 708 (1982); *Berryhill v. State*, 249 Ga. 442, 291 S.E.2d 685 (1982); *Solomon v. State*, 247 Ga. 27, 277 S.E.2d 1 (1981); *Dick v. State*, 246 Ga. 697, 273 S.E.2d 124 (1980); *Jones v. State*, 243 Ga. 820, 256 S.E.2d 907 (1979); *Amadeo v. State*, 243 Ga. 627, 255 S.E.2d 718 (1979); *Corn v. State*, 240 Ga. 130, 240 S.E.2d 694 (1977); *Young v. State*, 237 Ga. 852, 230 S.E.2d 287 (1976); *Pulliam v. State*, 236 Ga. 460, 224 S.E.2d 8 (1976); *Dobbs v. State*, 236 Ga. 427, 224 S.E.2d 3 (1976); *Goodwin v. State*, 236 Ga. 339, 223 S.E.2d 703 (1976); *Mitchell v. State*, 234 Ga. 160, 214 S.E.2d 900 (1975); *Moore v. State*, 233 Ga. 861, 213 S.E.2d 829 (1975).

SMITH

v.

SOUTHEASTERN FIDELITY INSURANCE CO.

No. 44245.

Supreme Court of Georgia.

Feb. 25, 1988.

Action was brought against insurer to recover no-fault benefits. The Superior Court, Polk County, Dan Winn, J., entered summary judgment for insurer, and appeal was taken. The Court of Appeals, 181 Ga.App. 316, 352 S.E.2d 407, affirmed and application for writ of certiorari was granted. The Supreme Court, Smith, J., held that: (1) policy exclusion, excluding from coverage job-related activities performed while occupying or operating motor vehicle, conflicted with provision of no-fault act requiring payment of no-fault benefits for accidental bodily injuries sustained while occupying any motor vehicle, so that exclusion was unenforceable; (2) insurer moving for summary judgment had burden of showing that no factual issues existed concerning whether vehicle was insured for purpose of no-fault statute; and (3) genuine issues of material fact as to whether insured's death was result of insured event, and whether insurer was given time-

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Supreme Court of the United States

No. A-855

JESSIE LEE,

Applicant,

v.

GEORGIA

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of the applicant,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 14, 1988.

s/ Anthony M. Kennedy
Associate Justice of the Supreme Court of the United States

Dated this 9th day of May, 1988.

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THE COURT: We are here this morning for the purpose of hearing motions which have been filed in the cases of the State against Jesse Lee and case of the State against Roy Lee, which are companion cases and in each of which the State is seeking the death penalty.

Is there any reason we can't hear first those motions requiring evidentiary hearings, Mr. Ott, so we can release the witnesses?

MR. OTT: Your Honor, the State has no objection to that and plannod on proceeding first on the motion for change of venue.

THE COURT: All right.

MR. BALLARD: We have no objection.

MR. JONES: No objection here, your Honor.

THE COURT: Have both defendants filed motions for change of venue?

MR. JONES: We have on behalf of Jesse Lee.

MR. BALLARD: And we have for the other.

THE COURT: Let me see if I can find the motion.

I understand that you wish to have these two motions heard together since the same evidence would be the same in both cases.

MR. BALLARD: If it please the Court, sir, I think under the standing of these cases, if one was granted the other would have to be granted, so you might

as well join them and hear them both at one time and be done with them.

MR. JONES: We agree with that position, your Honor.

THE COURT: We will proceed in that fashion. We will hear the change of venue together.

In preparing the transcript of this motion, Ms. Yeager, be sure and include a separate transcript for each of the two cases, even though they will be the same.

MR. OTT: Your Honor, I found my motion for change of venue.

THE COURT: I have one.

MR. WATERS: The last packet we filed last Wednesday had it in there, your Honor.

THE COURT: You may proceed.

MR. WATERS: If it please the Court, in burden will be on the defendants to produce this, so at this time I would like to call some witnesses. Is there a representative of the Walton Tribune present?

If it please the Court, we had subpoenaed the Walton Tribune. In just a moment I will ask someone if they will call them and I will proceed with some of the other witnesses.

THE COURT: I thought someone was downstairs a few

minutes ago. Wasn't someone from the Tribune downstairs a few minutes ago?

MR. MALCOM: I didn't see him, your Honor.

MR. OTT: We might be able to -- if he wants that, to introduce the copies of the newspaper articles, I think they will speak for themselves and I will not object to just the introduction of the newspaper articles, if that's what you wish.

MR. WATERS: If it please the Court, I will run through what I have. I have a newspaper article dated April (sic) the 13th and for purposes of the record I will mark that Defendant's exhibit number one.

I have a newspaper article dated September the 24th, 1986 to be marked Defendant's exhibit number two.

I have a newspaper article which is a copy that was provided by the Walton Tribune dated August the eighth, 1986, will be Defendant's exhibit number three.

I have another part of an article dated August 15th, 1986, xerox copy to be Defendant's exhibit number four. This is a copy that is provided, this is a letter to the editor, the date is not provided on this. They did not put the date on this. That will be Defendant's exhibit number five. And Defendant's exhibit number six is the circulation breakdown of the Walton Tribune.

At this time I would move for introduction of

DIRECT EXAMINATION

BY MR. WATERS:

Q. State your name, please.

A. Etta Soloman.

Q. And Ms. Soloman, where are you employed?

A. Clarke Broadcasting Corporation.

Q. What is the name of the radio station?

A. W. N. G. C.

Q. Where is that located?

A. Athens.

Q. And how long have you been employed by this radio station?

A. Two and a half years.

Q. Two and a half years. Now, does your radio station broadcast in the Walton county area?

A. Yes, we do.

Q. And do ya'll have a large audience here in the Walton County are?

A. Yes, we do.

Q. In the course of your broadcasts, do you run local news reports for this area?

A. Yes, we do.

Q. Back in August of 1985 were you employed in the news room at that time?

A. Yes, I was.

Q. Were you the main newsperson at that time?

A. I was not the main newsperson at that time, I was second in command at that time.

Q. Back in August of 1985 do you recall whether or not your radio station ran reports regarding the death and the robbery and murder of Spec Prather?

A. I thought this was August of '86.

Q. I am sorry?

A. August of '86.

Q. August of '86, yes.

A. Yes, we did.

Q. And from your own personal knowledge do you know how often you ran those articles of the news accounts?

A. Hourly.

Q. Now, you were given a subpoena to bring certain documents into court. Have you tried to find those documents, I think I asked for tapes and any documents showing what the newscasts were?

A. We do not regularly broadcast newscasts. We save scripts for a certain amount of time and the scripts pertaining to this have been destroyed.

Q. And have you in the course of the subpoena looked for those?

A. Yes, I have.

Q. Of your own personal knowledge you said that you knew they were running hourly?

A. Uh-huh.

Q. And do you know for how long these newscasts ran?

A. Generally, when there is a story of this nature, when a murder would take place, you would run in radio, local radio you would run that story for twenty-four hours, each single story; however, if there is any new development you pick up on that and run it for another twenty-four hours, so it could run as long as new things keep happening.

Q. Now, you broadcast yourself; do you not?

A. Yes.

Q. So you are personally familiar with the part we are talking about here?

A. Yes, I remember.

Q. When this story first broke you ran it like for twenty-four hours, you are talking about hourly?

A. Right.

Q. Then as developments progressed, like the arrest of the other brother, did ya'll then use that and run it hourly also?

A. Yes.

Q. As the other parties were arrested, did you

also run that?

A. Yes.

Q. And as they were released, unindicted or not indicted by the Grand Jury, did you also run that?

A. Yes.

Q. Insofar as the person or persons where you get these news reports, where did you get your information from?

A. From a spokesman for the Sheriff's Department, the Walton County Sheriff's Department.

Q. Do you know who the spokesperson at the sheriff's department is?

A. It could be whoever it is, happens to be on the phone at that time. They usually have a press release.

Q. Now, do ya'll have any type of marketing surveys or anything showing what your listening audience is in the Walton County area?

A. We do. I don't know the figures offhand.

Q. Now, that was addressed in the subpoena. Are you aware of that, that we asked for that also?

A. I don't think.

Q. That's all right. Tell me this, can you tell us whether or not there is a large audience here in the Walton County area?

A. I would say there is.

Q. Now, since you were personally involved in this newscast and everything, do you recall anything specifically regarding listener response to the stories that you were running in this particular case?

A. I remember that we received some phone calls about it. Usually when you do local news and there is a story of this nature, there is alot of interest from people on the street and we did get some phone calls asking about this particular story. I remember alot of people correcting me on the pronunciation on the dead man's name.

Q. With regard to your normal -- do you normally get response when you run these newscasts?

A. Yes, you do.

Q. With regard to this particular case, was it larger, smaller, the response that you got?

A. I think there was more, alot of people said that they had done --

MR. OTT: Your Honor, I object unless she tells us what she is basing this on. She seems to be thinking back and trying to --

THE COURT: Objection sustained.

BY MR. WATERS:

Q. Did you personally talk to any of the

listening audience that called in?

A. Yes, I did.

Q. And from your testimony of knowing that they were more listeners --

MR. OTT: My objection would be, I would like to know a foundation laid as how many she talked to, when she talked to them and things of this nature. This is vague.

THE COURT: Objection sustained.

BY MR. WATERS:

Q. Ms. Soloman, do you know how many people you talked to?

A. I would say maybe seven or eight.

Q. Seven or eight. And with regard to the number that you talked to, is that more or less than what you normally talk to on a story of this situation?

MR. OTT: Your Honor, my objection here is were these Walton County residents or Clarke County residents or other county residents.

THE COURT: Sustained.

BY MR. WATERS:

Q. Can you tell us whether or not they were Walton County residents?

A. I do not know whether they were Walton County residents.

A. It could have been anywhere from thirty seconds to a minute.

Q. Were there any broadcasts made after the week of August the fifth?

A. I don't remember.

Q. Don't remember. All the arrests were made and killing happened the week of August the fifth; would there have been any broadcasts after that?

A. I don't remember that there would have been, if there was anything new that developed in the case.

Q. Do you yourself know of any other broadcasts?

A. No.

Q. You have indicated a large number of Walton County listeners. What number, what can we pin that down to?

A. I don't know those figures.

Q. Well, can you give us a rough estimate?

A. No, I couldn't.

Q. Can you give us any idea?

THE COURT: If she doesn't know it doesn't make any difference. She can't guess, Mr. Ott.

BY MR. OTT:

Q. On information like this, does the

MR. JONES: Your Honor, I might also suggest to find out that they are all residents of the county.

THE COURT: Bill is doing that now and I will do that when I take the Bench. Any other preliminaries?

MR. OTT: None.

MR. JONES: We entered the -- just for information, we entered the people that gave flowers and attended the funeral and in my computer there were fourteen hundred and seventy-eight that was in there, which is a lot of people, Judge. Some of them are on this jury. We alphabetized them.

THE COURT: We will see the affect of that.

(Whereupon, the conference in chambers was concluded.)

A. Yes, we did.

Q. Mr. Bowick, I am going to show you what's been marked as Defendant's exhibit number twelve and I am going to preface from this point. Mr. Ballard, I think has stepped out to retrieve the original book where people sign in when they come through the funeral home, I will show you that in just a moment.

I am going to explain this to you. What you have is Defendant's exhibit number twelve, which is a copy of that book the D.A.'s office provided and I will ask you if can you identify that as being the book that was at your funeral home regarding Mr. Prather's --

A. This is the book at the residence of the family and we give the book to the family after the funeral. It is at their home, but it is presented to them for the people that sign. The pages at the funeral home are simply blank pages and they are in turn placed in the book and this is copies of what is in there.

Q. From your experience as a funeral director and everything, can you tell the Court whether or not this was a very large turn out at this funeral?

A. I would have to say that it was a large funeral in relation to funerals that we conduct annually.

Q. Now, when you say large; do you know, have

you got any idea approximately how many people came through here?

A. No, because the book is laid there and I know, you know, some people inadvertently may not sign it. I am sure that most do, but I have had people call me and say Arthur, I forgot to sign the book would you mind signing my name to it. That doesn't happen very often. But you can count the number of the pages and multiply it out and find out who was in the funeral home, but I don't have any idea how many there were.

Q. But not to belabor the point, but if I told you there were forty-four pages on that and containing at least six hundred and some odd people, would that --

A. Alot of people there.

Q. Some of the entries on here are more than one person on the lines; what I am saying is on some places you may have --

THE COURT: The document speaks for itself, Mr. Waters.

MR. WATERS: We have nothing further at this point.

MR. OTT: Your Honor, I don't have any questions of this witness.

THE COURT: You may step down, Mr. Bowick.

Any reason this witness can't be excused?

Q. And did you know; do you know what kind of business that he was involved in?

A. Yes, he was in the used car and wrecker business here in Monroe.

Q. Do you know how long he had been involved in that business?

A. For a number of years, as long as I knew him. I possibly met him around '69 or '70, perhaps 1970.

Q. Do you know of your own personal knowledge whether or not Mr. Prather was a member of any social organizations here in Walton county?

A. Yes, he was a member of the Eastern Star here in Walton County and the Masonic order, albeit I am a fellow brother. I sat in the lodge with him myself. He has been a leader in those organizations. I am aware of him and Hazel being worthy matron and patron, which are the chief leaders of the Eastern Star and they visited the other chapters throughout the county and I have been in lodge with both of them on any number of occasions.

Q. Do you know approximately how many members are in Walton County or members of the Eastern Star and Masonic lodge?

A. They number in the hundreds. We have a

large chapter in Loganville and here and Masonic orders and we have an Eastern Star in Loganville and one here, so there are hundreds, perhaps thousands.

MR. OTT: Your Honor, my question, my objection would be, does Mr. Prather belong to the one here in Monroe, one in Loganville and are they intermingled, what are we talking about?

THE COURT: You can ask him that when your turn comes.

BY MR. WATERS:

Q. I will ask you that, Mr. Jones. Do you know which order he was a member of?

A. He was a member of the chapters here in Monroe. Of course, they visit back and forth and have joint functions and so forth, we come here and they come there and so we intermingled alot together.

Q. And I think you mentioned while ago that it is a brotherhood society or fraternity?

A. Well, unless you are a mason it's -- it was developed as a secret organization and it still has secrets. There are secret degrees and so forth, not like the Lions Club or Rotary. It is actually a brotherhood, a fraternal brotherhood and Eastern Star is an off shoot, the female off shoot of it, that is set up much the same way. It is a brotherhood in that you

the murder and armed robbery of Spec Prather?

MR. OTT: Your Honor, my objection again is toward relevance and secondly, no foundation for Mr. Jones to give an opinion of that nature. There has been no foundation.

THE COURT: Objection sustained.

BY MR. WATERS:

Q. I am not sure if you missed this while ago. Do you know whether or not there is a lodge of the Eastern Star and Masons in Social Circle?

A. There is not. To my knowledge only two in Walton County,

MR. WATERS: That's all I have, your Honor.

CROSS EXAMINATION

BY MR. OTT:

Q. Briefly, Mr. Jones, Eastern Star is not, it is the wives; is that what you are saying?

A. It is for the females of the -- it's a Masonic order for females, you might say and it is connected to the Masons because to be in Eastern Star you must have your father or your husband or your son must be an active Mason.

Q. So Mr. Prather was not a member of Eastern Star Organization?

A. Yes, he is. Masons can join Eastern Star,

also. I am also in Eastern Star.

Q. So was he a member of Eastern Star?

A. Yes, he was the leader of the Eastern Star group here in Walton County.

Q. What is the number of members here in Monroe of Eastern Star and Masons?

A. I don't know the number. I been to many lodges and hundreds of people.

Q. One hundred or two hundred?

A. Probably the membership will get up to around eight or nine hundred in Monroe. It's probably about six hundred if I had to guess in Loganville.

Q. But you don't have any facts you are not telling us anything with certainly?

A. I am not an officer, I don't keep records, I just guess that.

MR. OTT: I don't have any further questions.

THE COURT: You may step down, Mr. Jones.

MR. WATERS: If it please the Court, just as a preliminary matter, we subpoenaed certain documents from Ms. Prather and in an effort to accommodate the family and not cause undue hardship, we discussed it with our clients, they have no problem with this. We subpoenaed the book in which we xeroxed and put it in as Defendant's exhibit number twelve. Also we asked for

cards and things that had been forwarded to the family to show sentiment and respect. I have this before the Court now. I do not want to introduce it in evidence. I have personally went through it myself and Mr. Ott has no objection. We want to tender to the Court and show it and state on the record that there are three hundred and thirty cards located in this thing and when I went through them I checked them and I have found approximately ten of them that are outside of the Walton county area. So out of the three hundred and thirty, approximately three hundred and twenty-five is from the Walton County area. These are from residents and friends and family from the Walton County area.

Is that stipulation sufficient with you, Mr. Ott?

MR. OTT: I don't have any problem with that.

MR. WATERS: One other one and I am going to mark this Defendant's exhibit thirteen.

If it please the Court, Defendant's exhibit number thirteen is a register regarding gifts, food and things that were provided to the family by residents here. The showing to Mr. Ott, this was copied by his office from the Prather records. I tender that in evidence.

THE COURT: Copied from where?

MR. WATERS: Ms. Prather's records, the ones we

subpoenaed from her.

THE COURT: Any objection?

MR. OTT: No objection, your Honor.

THE COURT: Admitted without objection.

MR. WATERS: One other related matter, I think we can stipulate into the record. I have not discussed this with Mr. Ott, but I don't think we will have a problem with it. With regard to a hearing in this matter, the magistrates in the county were all related to Mr. Prather in some degree and the two magistrates had to be recused and I think they waived the third magistrate, Judge Adams hear this is case.

MR. OTT: Judge Malcom realized he was distantly related to the Prathers, possibly, he recused himself and Judge Adams heard the case after making a finding with Mr. Hill and myself present and also Mr. Jones and myself and the defendants were present about the fact he was distantly related by marriage to Mr. Prather and it is contained in the committal hearing record about that full waiver on the committal hearing transcript that we conducted and all defendants and Mr. Hill and Mr. Jones and myself waived any possible conflict, although under the law we didn't feel there was any conflict.

MR. WATERS: I just wanted that made part of this.

THE COURT: He was not related within the prohibitive degree?

MR. OTT: We determined that, but in an abundance of caution Judge Adams went ahead and made certain that the defendants were aware of this.

THE COURT: The defendans individually and their counsel waived any objection they may have to Judge Adams?

MR. OTT: That's my --

MR. HILL: Your Honor, just for clarification purposes, the latter statement is correct. We waived whatever degree of relationship there was and it was a close question as to whether or not he was or wasn't. We went ahead and waived whatever it was, but the only statement that I take issue with is whether or not he was. We waived whatever it was, but I am not certain it was not within a --

THE COURT: What was it?

MR. OTT: Yes, sir, it is on the record.

(Whereupon, the judge reads the transcript.)

THE COURT: It appears to me they weren't related at all. Under the theory of consanguinity or by blood. He says that his aunt married the deceased's uncle and his uncle married the deceased's aunt, but that's not relation under the law.

MR. JONES: Thank you, sir.

MR. OTT: I don't have any questions.

THE COURT: You may step down. Anything else, Mr. Ott?

MR. OTT: Nothing from the State, your Honor.

MR. JONES: We would like to reserve to keep the record open to allow us to produce these news releases, if there are any, we just covered it. I didn't know they did even did that at the sheriff's office and keep the record open for that purpose.

THE COURT: We will leave the record open and the Court will reserve decision on the motion for change of venue until after the voir dire of the jurors summoned to hear the case. The question here is whether or not these defendants can receive a fair trial in Walton County and the Court will be better able to make that determination after we have heard from these prospective jurors and you may supplement the record up until that time if you wish.

Well, wait a second. Mr. Cown?

THE JUROR: I have known him, personal friend.

MR. DAY: Let me ask me this. Would your friendship with Mr. Prather cause you to not be able to decide the case based on the evidence and based on what you hear strictly from the stand?

THE JUROR: I don't think so.

MR. DAY: You could then decide the case, you could presume this defendant to be innocent at the outset and decide the case solely on the evidence?

THE JUROR: Yes, sir.

MR. DAY: On the second row? Is there somebody else?

THE JUROR: Albert Stowe.

MR. DAY: You are close personal friends?

THE JUROR: Not real close, but I knew him for a long time.

MR. DAY: Would your friendship with Mr. Prather cause you not to be able to decide the case solely on the evidence from the witness stand?

THE JUROR: I don't think so.

MR. DAY: The next row. Anymore on the second row before we move on? Now, on the third row, anybody that was a friend of Spec's?

THE JUROR: Ms. Waldrop, a friend and cousin.

that your related to a police officer in anyway cause you not to be impartial in deciding the case; that is, if a police officer were to testify would you believe what they said as opposed to someone else solely because they are police officers?

THE COURT: I will not allow that question. It calls for prejudgment of the case. The jury is entitled to hear all the witnesses testify before --

You may ask the first part of the question, which I will ask for you. The fact that you have a relative who is a police officer or has been a police officer, does that cause you to be impartial in anyway at this time? Would that prejudice you or biar you in anyway toward the State at this time, if so please stand. You may continue.

MR. DAY: There will be several witnesses in this case and I wanted to go through this list and see if any of you know any of those people so if you do, I will go slowly enough, so I think, please raise your hand. Anybody know Ben Williams, he is a member of the Georgia Bureau of Investigation? Anybody know Sue Nett Williams, lives here in town on West Washington Street. Anybody know Al Yarbrough works for the sheriff's office? Okay. Let's stop at Al Yarbrough a second. If you would, please stand and give your name?

THE JUROR: Julie Burt.

MR. DAY: If you would go around and have everybody give their names and then I will ask you a follow-up question rather than ask the questions of everybody. Yes, ma'am?

THE JUROR: Susan Autry.

THE JUROR: Norris Cown.

THE JUROR: John Allgood.

THE JUROR: Marie Peters.

MR. DAY: Anybody on the second row? Mr. Stowe?

THE JUROR: Albert Stowe.

THE JUROR: Adrian Cown.

MR. DAY: Third row?

THE JUROR: Melinda Quinn.

THE JUROR: Harold Johnson.

THE JUROR: Susan Dempsey.

THE JUROR: Melissa Cain.

MR. DAY: How about on the fourth row? Anybody on the fourth row?

THE JUROR: Eleanor Jane Phillips.

THE JUROR: Nelson Garrett.

THE JUROR: Billy Williams.

THE JUROR: Lisa Almand.

MR. DAY: And then the last four jurors? Would your relationship with Al Yarbrough, friend or whatever

Edward, also known as Teenie Towler; anybody know Mr. Towler?

Doug Robinson, does anybody know Doug Robinson who lives on North Broad Street?

Yes, ma'am, your name?

THE JUROR: Cynthia Booker.

MR. DAY: Would your relationship cause you to be prejudiced one way or the other so you wouldn't be able to be impartial in deciding the case?

THE JUROR: No.

MR. DAY: You also know Linda Robinson?

THE JUROR: Uh-huh.

MR. DAY: Does anybody else know her?

THE JUROR: I just know of her.

MR. DAY: Does anybody here know Linda Robinson?

Rosa Mae Byrd, anybody here know Rosa Mae Byrd? Joe Peters. Anybody here know Joe Peters? Otis Williams, anybody here know Otis Williams? Brenda Ann Williams. Anybody here that knows Brenda Ann Williams?

Keith Goff, he is technician at the crime lab; anybody know Mr. Goff or Louis Cuendet also from the crime lab, anybody know him?

Johnny Smith works at the sheriff's office; how many folks know Johnny, also known -- yes, ma'am, Ms. Bloodsaw. Would the fact that you know Johnny, either

of the two that indicated that they do, would that cause you to be partial one way or the other so that you couldn't be partial?

Let me ask this next one. Does anybody here not know Franklin Thornton? Anybody that knows Franklin, if the fact that he testified, would that make you partial one way or the other where you couldn't be impartial and take your evidence solely from the witness stand?

Anybody know Kelly Fite from the crime lab? Or Ray Santamaria, also from the crime lab.

Anybody know Captain Eddy Sharpe, Monroe Police Department? Of those who indicated so by raising their hand, would the fact that you know Captain Sharpe cause you to be partial one way or the other and not able to be impartial in deciding the case?

Anybody know Winnie Sturdivant, Magnolia Apartments here in Monroe?

Anybody know Captain Barney Manders? Those who indicated that they know him, would the fact that you know him cause you to be partial in anyway?

Anybody know Wilda Williams who lives on West Washington Street? How about Mike Head who used to be with the City of Monroe Police Department? Of those who know Mike, is there anybody here who would be partial one way or the other because of their relationship with

Mike?

Anybody know J. L. Sims of Rolling Hills Trailer Park? How about Charles C. Williams lives in Decatur or Betty Marie Williams who lives in Decatur.

Anybody know James Panter, technician at the crime lab? Or Connie Pickens or Warren Tillman or Byron Dawson of the crime lab. Anybody know Billy Melton who lives here in Walton county, or Betty Byrd, I am sorry we have a couple of folks who know Billy Melton.

Mr. Williams, was it Mr. Williams and yes, ma'am? Ms. Stanton. Would that cause you not to be able to decide the case based solely on the evidence?

Did I ask about Eddie Byrd? Anybody know Eddie Byrd? How about Danny Boyce? Willie B. Byrd, route five Cannon Road, anybody know Mr. Byrd?

How about Evelyn Byrd who lives at George Walton Homes? How about Willie Williams?

Anyone hear ever been the victim of a violent crime?

Did anyone here attend the funeral, send flowers or send cards or something of that related to Mr. Prather, not that you have to be related to him, but having been interested in attending. If we could, let's start with you, ma'am. Please stand up and tell what your name is and what you did?

THE JUROR: Harriet Hester. I attended the funeral and sent a card.

MR. DAY: Would the fact that you took that sort of interest in it cause you to be partial in anyway that you would not be able to decide this case based solely on the evidence?

THE JUROR: No, sir.

MR. DAY: Thank you, ma'am. The next person on the first row? Ms. Whitley?

THE JUROR: I sent a card, but I don't think it would make me impartial.

THE JUROR: Susan Autry. I am a friend, acquaintance of Ms. Prather, but I talked to her and expressed my sympathy, so I did know her slightly.

MR. DAY: You think you could fairly decide the case impartially?

THE JUROR: Yes.

MR. DAY: Anybody else on the first row?

How about on the second row there? Anybody attend the funeral or send a card, flowers or something of that nature? How about the third row? Yes, ma'am?

THE JUROR: I sent flowers.

THE JUROR: I sent flowers.

MR. DAY: Ms. Waldrop, would that cause you to be partial in anyway, your having to take time out to do

MR. OTT: Thank you, Ms. Nelson.

MR. DAY: Is Susan Nelson your sister?

THE JUROR: Uh-huh.

THE CLERK: Steven Fields.

THE JUROR: Steven Fields. Route one Monroe, Georgia. I am the science coordinator for the Rockdale County School System and my life, Joanne is a teacher in Walton County School System. I lived here thirteen years, but not consecutively.

MR. OTT: Thank you, Mr. Fields.

MR. DAY: Thank you, sir.

THE CLERK: Deidre Williams.

THE JUROR: Deidre Williams, route three, box 364 Monroe, Georgia and employed by the National Bank of Walton County and I lived here twenty-six years.

MR. OTT: Thank you.

MR. DAY: Thank you.

THE CLERK: Albert N. Stowe.

THE JUROR: Albert Stowe. 303 Cain Street, Social Circle, Georgia. I own and operate Stowe Glass Company. My wife is Christine Stowe and works for Ready Med in Conyers, Georgia.

MR. OTT: Thank you, Mr. Stowe.

MR. DAY: Thank you.

THE CLERK: Georgette Brown.

THE JUROR: I live at 112 Hillside, Monroe, been a resident for sixteen years and my husband died four and a half weeks ago.

MR. OTT: Thank you, Ms. Brown.

MR. DAY: Thank you.

THE CLERK: Dorothy Needham.

THE JUROR: Dorothy Needham, route two, Monroe, Georgia. Employed by Scientific Atlanta. My husband is Jerry Needham and employed with General Motors and I lived here all my life.

MR. OTT: Thank you, Ms. Needham.

MR. DAY: Thank you, ma'am.

THE CLERK: Adrian Cown.

THE JUROR: Adrian Cown. Employed by Bell South. My husband is Melbert and he works for Southern Bell and I lived here about twenty-six years.

MR. OTT: Thank you, ma'am.

MR. DAY: Excuse me, what do you do for Bell South?

THE JUROR: I am a clerk.

MR. DAY: Thank you, ma'am.

THE CLERK: Donald Leon Martin.

THE JUROR: Self-employed with contractor. I live route five, Loganville. Wife is secretary treasurer and I lived here for about ten years.

MR. OTT: Thank you, Mr. Martin.

MR. DAY: Thank you, sir.

THE CLERK: Melinda Quinn.

THE JUROR: Melinda Quinn, route five, box 113 Monroe, Georgia. Employed with the Walton Mental Health Clinic. My husband is employed with the Walton Probation Office and we lived here fourteen years.

MR. OTT: Thank you, Ms. Quinn.

MR. DAY: Thank you, ma'am.

THE CLERK: Cynthia Booker.

THE JUROR: Cynthia Booker. 311 Ashe Street. Unemployed. Lived here all my life.

MR. OTT: Thank you, Ms. Booker.

MR. DAY: Thank you, ma'am.

THE CLERK: James E. Jones, Jr.

THE JUROR: James Jones, Jr. Employed by Transcontinental Pipeline in Stockbridge, Georgia. My wife is Margaret Jones. Employed by Certainteed in Social Circle and lived in Walton County all my life.

MR. OTT: Thank you, Mr. Jones.

MR. DAY: Mr. Jones, what do you do for Transcontinental?

MR. JONES: Field administrator assistant.

MR. DAY: Thank you, sir.

THE CLERK: Robert O'Conner..

Q. Brian, excuse me, but did you prepare an exhibit in connection with the research that you did?

A. Yes, I did.

MR. HILL: Your Honor, I would like to have that marked Defendant's exhibit number fourteen.

THE COURT: Okay.

MR. OTT: For the Court, I have a copy here.

THE COURT: Have you seen this, Mr. Ott?

MR. OTT: No, your Honor, I have not.

MR. HILL: I am supplying him with a copy.

BY MR. HILL:

Q. Would this be helpful in your explaining what you did?

A. Sure.

Q. Explain to the Court your exhibit there?

A. Okay. What you see is basically the group we are talking about, young people in Walton County on the Grand jury list. The first chart or the first line that you see deals with 1987 against 1987, that relates to the current Grand jury list that I was supplied with. Next to that you see thirty-three point oh two percent under the category of community, that statistic reflects the percentage of young people in Walton County at this time. On the next line over you see a statistic five point oh two percent under Grand jury pool. That

reflects the percentage of young people that are present on a current Grand jury list that we were provided with. Underneath those statistics you see the same statistic in the community, thirty-three point oh two percent for 1984 and 1986 and one point nine percent, which was the percentage to young people that we discovered on the previous term list.

Q. Mr. Stevenson, would you tell me how many names off the Grand jury that you actually analyzed in making your computation?

A. We looked at every name on the Grand jury list.

Q. How many names were there?

A. Approximately three hundred. We gathered data on age, race and sex.

Q. Is that what you call the hundred percent study?

A. This is a hundred percent.

Q. Would you explain to the Court what absolute disparity is?

A. All right. After we got the two percentages, that is we understood how many people are in the community, how many people are on the list, we basically attempted to articulate the difference and there are basically three ways that we presented that

data on this exhibit. The first relates to the absolute disparity, that is the absolute difference between the two numbers, thirty-three percent on the community and five percent on the jury list. The 1987, twenty-eight percent statistic reflects that absolute disparity and that's very easily calculated if you subtract the total people in the Grand jury pool from the percentage of people in the community and that's the difference.

Q. Would that be thirty-three point oh two reduced by five point oh two?

A. That's correct.

Q. Absolute disparity of twenty-eight percent?

A. That's right. And for the previous term the similar technique was used, thirty-three point oh two percent subtracted by one point nine percent which gives you thirty-one point oh percent disparity.

Q. Would you explain the term comparative disparity and tell us what it means?

A. We also computed comparative disparity because there are alot of circumstances and situations where absolute disparity does not provide, give you a percent of what the disparity is. For example, if you got a group that is only ten percent and they are in the community and they are one percent on the jury pool, you will have an absolute disparity of nine percent, which

will seem comparatively low, but in fact ninety percent of the people in that group are not in the jury pool, so in order to really reflect that, what you do is compute the comparative disparity and to compute the comparative disparity you first calculate absolute disparity, is what we done in the first category, in this example ten minus one in the Grand jury pool on this exhibit thirty-three minus five point oh two percent and then you divide that by the percentage of the group in the community it gives you more of a reflective statistic on how, what percentage of underrepresentation actually is going on.

So to calculate the 1987 comparative disparity on this exhibit, we first determined the absolute disparity of twenty-eight percent and divided that by the percentage of the group in the community, which is thirty-three percent and that gives us the eighty-four percent underrepresentation. That's essentially saying that eighty-four percent of the young people in the community are underrepresented on the current Grand jury list.

Q. Would you tell -- are you familiar with the statistical significance?

A. Yes.

Q. Would you explain to us what that means?

particular size for a group this big and we calculate that statistic by comparing the sampling proportion of a sample distribution with a normal distribution and that let's us know that the difference between what we see in our sample and what's in the entire pool is going to be less than point five percent.

Q. What did your figures indicate about the traverse jury pool?

A. The traverse jury pool we again saw an underrepresentation of young people between the ages of eighteen and thirty exclusive. The list or the exhibit that has been made available indicates that we found ten percent of the traverse jury pool being young people ten point eight percent. We then calculated the same kind of disparities that we did in making the Grand jury analysis with results in a absolute disparity of twenty-two percent, a comparative disparity of about sixty-seven percent and the difference of about twenty-one point three standard deviations and without talking about the number of standard deviations which are statistically significant we can calculate the probability of this many standard deviations occurring by chance as being something less than one in a trillion, the same calculation would be the same with the Grand jury.

something happening by chance of less than one in twenty or one in a hundred.

MR. OTT: That's what my objection goes toward, your Honor, is this probability fact he is talking about, the bell curve he is talking about is not actual, it's just speculation and I object to the speculative nature of his testimony.

THE COURT: Overruled.

THE WITNESS: Again, bell curve, Z. statistics that we are talking about, the bell curve these probabilities are calculated based on the size of a group, you know, mathematically deduced and they are clear. Z. statistics are used every day and every aspect of business and mathematics and social scientists. They are finite and definite.

What we do is compare the number of standard deviations and look up the probability of sense in essence of a standard deviation of this magnitude; probability of a standard deviation of this magnitude, twenty-one point three or ten point nine occurring by chance is less than one in a trillion.

BY MR. HILL:

Q. I show you Defendant's exhibit fifteen; is that a computer printout you used in making your computations?

A. No, sir, not to my knowledge, no, um-hum.

Q. Well, you would know, wouldn't you?

A. Yes, I would know and too, I must say we have a very broad-minded board of jury commissioners because that board of jury commissioners know that, you know, that everybody has got to get started off in doing their civic duties and, you know, and you don't normally wait until you are thirty-five or forty years old to get started off, so we got a very broad-minded board of jury commissioners and they realize that the young people can put, have just as much impact and influence and welfare and being of the county as other people because, as I said, you got to start off at some bracket and --

Q. When you reconstituted the jury roll in the early part of this year, was it the last part of last year, when did you?

A. Last year, last fall.

Q. End of '86?

A. Yes and they found out when this case came into making that there was a disparity in the race and sex, so the jury commissioners got -- Judge Ridgway issued another order and called them back to re-do the box to coincide with the census, with the bracket from eighteen to twenty-five or above and of course, this being in with the Supreme Court Rules and this is not my

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females?

A. Yes, but those percentage figures would take it all in from from eighteen to sixty-five.

Q. But you are not attempting to balance the box respecting age brackets?

A. No, sir, no, sir. Our attempt was to balance the percentage wise, as I said, from eighteen to sixty-five plus, that was our intent and that's what we did and that's why the form was filled out for you to certify there is no disparity.

Q. You already testified that you know you can go outside the voter registration list in your efforts to bring the box in balance. My question is in constituting this particular jury roll, did you have to go outside the voter registration list to achieve a balanced box?

A. No, sir.

Q. Used the voter registration list as your sole record?

A. Voter registration list.

Q. All persons whose names appear on the jury roll came from the voter registration list?

A. Yes, from the voter registration list. And I might add, too, because I know they have been at times jury commissioners will go outside the list and we would

with me.

THE COURT: Do you agree that's the latest decision?

MR. HILL: Your Honor, I think so.

THE COURT: What is the date of that?

MR. HILL: I think that right now, actually --

Do you have the cite of it?

THE COURT: I have a cite, a 1983 case. 720 F2nd.

MR. OTT: Your Honor, there may be a Georgia case.

THE COURT: Oh, all right.

(Whereupon, Mr. Batchelor returns to the witness stand.)

BY THE COURT:

Q. Before proceeding any further with this challenge I wanted to inquire of you, Mr. Batchelor, regarding the difference between percentages of persons in this age group represented in the Grand jury pool and the traverse jury pool.

Now, Defendant's exhibit fourteen shows that persons in this age group constitute ten point eight percent of the persons named in the traverse jury pool and only five point oh two percent of those in the Grand jury pool. Can you explain that difference?

A. No, sir, I can't.

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Q. How do you constitute your Grand jury pool?

A. The jury commissioners, the law instructs them they go back over their jury selection and pick the most intelligent and upright citizens in the county.

Q. The most intelligent and upright?

A. Sort of the cream of the pick goes to make up the Grand jury pick, that's what the law or something of that nature, the law instructs the Grand jury.

Q. What does that mean, to select the most experienced and upright and they might be inclined to choose older jurors than younger jurors?

A. They could, but as I said, I don't think that would be the sole reason, but that could have some bearing on it.

THE COURT: Do you have the jury commissioners on call, Mr. Ott?

MR. OTT: Yes.

THE COURT: I want to hear some testimony on that procedure. Who is available?

MR. OTT: All are available. I need to call them.

(Whereupon, a recess was held.)

MR. HILL: Defense would like the Court to invoke the rule. I don't know if any other commissioners are

Q. Was there ever any plan, either individually by yourself or in concert not to choose young people?

A. Absolutely not. There is young people in the box.

Q. And --

A. There is alot of young people in the box eighteen and twenty years old.

Q. And was it, I think you already indicated you used the voters registration list in the latest, end of 1986 to reconstitute the box?

A. Yes, that's right.

MR. OTT: Judge, I don't have any further questions at this time.

THE COURT: Mr. Hill?

MR. HILL: Your Honor, I have no questions for this witness.

BY THE COURT:

Q. Mr. Malcom, after you prepared your traverse jury roll, how then did you prepare your Grand jury roll?

A. Well, each commissioner would pick the ones out of his district that he thought, you know, that would make a good Grand juror, which would, you know, sort of we thought would be sort of the cream of the

crop, saw the best of the traverse jury.

Q. Best of the to determine how?

A. Well, as we knew them in the community, as to education or as we knew them, the best we knew of them, you know.

Q. The most upright, most intelligent and most experienced?

A. That's right. The ones that we, of course, you know a man's character is what you hear about him, not necessarily what he is, but what we had heard about them. We picked the best ones that we, you know, that we knew.

Q. In your words the cream of the crop, trying to get the strongest citizens?

A. I would say that's correct, right. We probably have the best jury in the State of Georgia insofar as being accurate.

Q. Was ever any attempt by you jury commissioners to exclude anyone because of age regardless of years?

A. No, that's, the only, you know, if a person was seventy or seventy-five years of age or seventy years old, if he could hear, if he was, you know deaf, we felt like he couldn't hear, you know, we didn't put him on, you know, but we put on, doesn't mean we put

on everybody. I mean, you know, naturally we didn't put on everybody, but we did not discriminate against anybody.

THE COURT: Any further questions?

MR. OTT: Not from the State, your Honor.

CROSS EXAMINATION

BY MR. HILL:

Q. Mr. Malcom, I would like to ask you one question. Will you state your age for the record?

A. My age is sixty-one.

MR. HILL: Thank you, sir.

Your Honor, I have nothing further.

THE COURT: Thank you, Mr. Malcom, you may step down.

The Court is not interested in hearing anymore.

MR. OTT: The State does not intend to call.

THE COURT: Does Mr. Hill wish to examine anymore witnesses in this regard?

MR. BALLARD: Judge, the only think we can do on this, counsel asked the age of this commissioner. If we could stipulate that we enter in the age of the commissioners into this record, we would have no reason to call any evidence because that's the only question we would ask any of them, what their age is. Do you have any objection?

commissioners followed the dictates of the statutes of this State set forth in O. C. G. A. Title 15 Chapter 12, that the commissioners placed on the jury roll intelligent, upright and experienced persons to serve as jurors and that from that roll they must then select the most intelligent, upright and experienced jurors for the Grand jury roll.

Secondly, the Court finds from the testimony presented that the representation of this age group on the jury venire was not unfair or I should say is not unfair and is not unreasonable in relation to the number of such persons in the community for the reasons already stated and for the further reason that the jury commissioners use as their primary source, in fact as their only source in preparing the current jury roll the voter registration list of this county.

The defendant has not shown the composition of the voter registration list. It may very well be that if we had the percentages of the persons falling within this age group in both the Grand jury and the traverse jury rolls in proportion to those percentages shown on the voter registration list, that there would not be any disparity at all. We don't know that. All we can say is that based on information at hand and considering the manner in which the jury roll was prepared we cannot

draw any conclusions regarding any disparity. All we can find is that the disparity shown is in relationship to the population of the county, not the voter registration list.

So the defendant has failed to show any systematic exclusion of persons in this age group in the jury roll and the defendant has also failed to show that any underrepresentation of this group was due to any unfairness or unreasonableness in the jury selection process.

As I understand the law as it now stands in this regard, the defendant, in order to assert a successful challenge to the jury roll regarding underrepresentation of any class of persons other than the four recognized classes, that is males, females blacks and whites, must show that such persons are underrepresented systematically and that such underrepresentation was unfair and unreasonable in relation to the number of persons in the community and that A a matter of fact at the time and location in question such group was a distinctive group. To show a distinctive group the defendant must show that the group is defined and limited by some factor; that a common thread or basic similarity and attitude, ideas or experience runs through the group and that there is a community of